LEC CONTRACTORS (M) SDN BHD

v.

CASTLE INN SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL KADIR MUSA J
[ORIGINATING SUMMONS NO: 22-2040-1998]
15 JANUARY 2001

CONTRACT: *Building contract - Retention sum - Plaintiff's right to have it set aside pursuant to cl. 30(4)(a) of contract - Whether right could not be exercised upon rescission of contract - Whether plaintiff entitled to compensation under s. 76 of Contracts Act 1950*

CONTRACT: *Rescission - Building contract - Rights and obligations of parties - Retention sum - Plaintiff's right to have it set aside pursuant to cl. 30(4)(a) of contract - Whether right could not be exercised upon rescission of contract - Contracts Act 1950, ss. 65, 76*

The plaintiff was the main contractor of the defendant developer in relation to a hotel cum office development project. The plaintiff rescinded the contract ('the Contract') executed with the defendant in relation to the said project purportedly due to the default of the defendant in failing to comply with the terms and conditions therein. The plaintiff now applied for a declaration that a retention sum ('RS') that was to be set aside pursuant to cl. 30(4) of the Contract, be placed into a separate bank account by the defendant on trust for the plaintiff pending final outcome of an arbitration between the parties concerned.

The primary issue was whether the defendant was required to set aside the RS after the plaintiff had rescinded the Contract.

Held:

[1] The rescission of the Contract was unilaterally done by the plaintiff on allegedly a legally sufficient ground that the defendant had defaulted in the Contract. Not every default in a contract will give rise to a right of rescission. Thus, whether or not there was that legally sufficient ground to declare rescission of the Contract must be decided by the court and there was no evidence to that effect.

[2] Upon rescission of a contract, future rights and obligations of the parties concerned are discharged but those previously vested or incurred remain untouched. The previous right vested in the plaintiff was the

right to have recourse to the RS if it was set aside and only then would the plaintiff's right to it remain untouched. If the RS was not set aside, then it would be the plaintiff's obligation to insist that the RS be set aside by way of specific performance of cl. 30(4)(a) of the Contract. That obligation must be done during the subsistence of the Contract and not after it was rescinded.

[3] There was no evidence herein that the RS was set aside or that there was a demand by the plaintiff to request or compel the defendant to set aside the RS before the Contract was rescinded. The setting up of the RS after rescission would tantamount to a future obligation of the defendant which upon the plaintiff's rescission of the Contract had come to an end. Further, since the RS had never been set aside, the question of trust was not an issue before the court. Therefore, by virtue of s. 56 of the Contracts Act 1950, the defendant could not be ordered to fulfil his obligation of setting aside the RS after the Contract was rescinded by the plaintiff. However, the plaintiff had a right to claim for damages under s. 76 of the said Act, if it could be proved that the defendant had constructively caused the plaintiff to rescind the contract.

[Plaintiff's application dismissed with costs.]

Case(s) referred to;

Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor [1987] 2 CLJ 36 ***(refd)***
Concorde Construction Co Ltd v. Colgan Co Ltd [1984] 29 BLR 125 ***(refd)***
Henry Boot Building v. Croydon Hotel & Leisure Co 36 BLR 41 ***(foll)***
Hsin Chong Construction Co v. Yaton Realty Co 40 BLR 119 ***(foll)***
Johnson v. Agnew [1980] AC 367 ***(refd)***
Kuruppiah v. Petaling Garden Co Sdn [1972] 1 MLJ 173 ***(refd)***
Mac-Jordan Construction Ltd v. Brookmount Erostin Ltd (in administrative receivership) 56 BLR 1 ***(dist)***
Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 ***(refd)***
Mussen v. Van Diemen's Land Co [1938] 1 All ER 210 ***(refd)***
Rayack Construction Ltd v. Lampeter Meat Co Ltd [1979] 12 BLR 30 ***(dist)***
Re Marshall's Will Trusts [1945] 1 All ER 550 ***(refd)***
Yong Mok Hin v. United Malay States Sugar Industries [1967] 2 MLJ 9 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 40, 56, 65, 76
Specific Relief Act 1950, s. 41

Other source(s) referred to:

Black's Law Dictionary, 1990, 6th edn, p 1306
Declaratory Orders, Yoning, 2nd edn, pp 605-606
Judicial Dictionary, KJ Aiyar, 1998, 12th edn, p 1078
The Law Lexicon, P Ramanatha Aiyar, 1987, reprinted edn, p 1117

For the plaintiff - Vincent Lim; M/s Vincent Lim & Keoh
For the defendant - Dato' Sivaparanjothi; M/s V Siva & Partners

Reported by Usha Thiagarajah

JUDGMENT

Abdul Kadir Musa J:

LEC Contractors (M) Sdn. Bhd., the plaintiff, filed in the encl. (3) application on 29 October 1998 for prayers (a) - (e) of the said encl. (3). The said encl. (3) is supported by Joe Hyon Jae, encl. (2), dated 28 October 1998. By that application, the plaintiff is seeking for the following reliefs:

a) a declaration that the defendant is obliged forthwith to pay the sum of RM4,800,000 being the said retention sum under the Conditions of Contract into a separate bank account hereinafter referred to, the defendant thereafter to stand possessed of such sums in such account as trustees thereof to apply the same only in accordance with the trusts specified in cl. 30(4)(a) of the Conditions of Contract:

b) an injunction ordering that the defendant forthwith pay the sum of RM4,800,000 being the said retention sum under the Conditions of Contract into a separate bank account whereby the defendant hereafter to stand possessed of such sums in such account as trustees thereof to apply the same only in accordance with the trusts specified in cl. 30(4)(a) of the Conditions of Contract executed by the plaintiff and defendent on 9 January 1996;

(c) An order that the defendant, for the purposes of payments and the trust referred to in paras (a) and (b) hereof do:

(i) forthwith upon making of this order cause to be opened a separate bank account to be designated "LEC Contractors (M) Sdn. Bhd. (formerly known as Lotteworld Engineering & Constructions Sdn Bhd) Trust Account";

(ii) forthwith upon the opening of such account inform the plaintiff by letter signed by a proper officer of the defendant, disclosing full particulars of the said bank account including the name in which the same is maintained and the number thereof and the name, branch and address of the bank maintaining the same; and

(iii) forthwith upon receipt of all bank statements and other communications of whatsoever nature touching upon or concerning the said bank account furnish true copies of the same to the solicitors of the plaintiff.

d) An injunction restraining the defendant, by its directors, officers, servants or agent or any of them otherwise howsoever from applying the trust monies as and when paid into a separate bank account, otherwise than in accordance with the said trusts; and

e) That the costs of this application be to the plaintiff in any event.

From the above, it is without doubt that the plaintiff's prayer for an **order of a declaration as per para (a) aforesaid ("the said Order") is the main and substantive prayer of the encl. (3) application.** All the other reliefs sought will have to depend on whether or not the plaintiff is successful in obtaining the said order.

Enclosure (3) application ("the application") was filed by the plaintiff on 29 October 1998 flowing from the **undisputed termination or rescission of the agreement contract** duly executed between the plaintiff and the defendant, Castle Inn Sdn Bhd, **on** 15 July 1995 ("the contract"). By the contract, the plaintiff was the main contractor and the defendant was the employer for the project known as:

> The Execution and Completion of a Proposed Hotel cum Office Development at Jalan Harimau, Johor Bahru, for Castle Inn Sdn Bhd,

for the sum of RM96 million. The terms and conditions of the contract are as stipulated by exh. "JHJ-1" to encl. (2).

From the plaintiff's submission, it became very apparent to me that the main concern of the plaintiff in filing the application was, according to Encik Vincent Lim, learned counsel for the plaintiff, "**... to preserve the *status quo* of the matter ...**" pending a final outcome in arbitration pursuant to cl. 34 of the contract. The said cl. 34, *inter alia*, provides:

> 34(1) In the event of any dispute or difference should arise between the Employer or Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the works, as to any matter ... whatsoever nature arising thereunder or in connection therewith ..., shall be referred to arbitration:
>
> ...

"**[T]he matter ...** ." referred to by Encik Vincent **must surely be "the RM4,800.000.00 retention sum" ("the RS")** which represents 5% of the RM96 million for the whole aforesaid project under the contract.

From the above, it was strongly and elaboratedly argued by Encik Vincent that, based on the facts of the application and a number of decided cases referred to and relied by him, it would be the defendant's primary legal

duty to set aside the RS and place it in a separate bank account on trust for the plaintiff by virtue of cl. 30(4) of the contract even after the contract was howsoever terminated. Thus as trustee for the plaintiff, it was his submission that, the defendant was under legal obligation **not only** to open such an account **but** also contractually bound to maintain the same **for** the benefit of the plaintiff. If that was not yet done, it would therefore be the defendant's legal duty to do so. Since there was **no** denial **by** the defendant that the RS had never been set aside in line with the intention of the aforesaid cl. 30(4) **even till 19 October 1998** when the application was filed, it was therefore submitted by Encik Vincent that the court should be sufficiently persuaded to grant order in terms of the application; hence "... preserv[ing] the *status quo* of the matter ... ." pending for final outcome in arbitration as stated earlier.

Dato' Siva, learned counsel for the defendant, agreed that the aforesaid cl. 30(4) imposes a contractual obligation to create such RS in certain factual circumstances. On that basis, he therefore vehemently argued that, on the facts of the case before me, his client was **not** bound to do so for a number of reasons; the **main and substantive** one was the **rescission** of the contract **by** the plaintiff *vide* their letter dated 11 July 1998 marked as "THB1" to encl. (5A) in exercise of their rights pursuant to cl. 26(1)(6) of the contract. He submitted that such an act **by** the plaintiff has the effect of making the contract void *ab initio* which will consequentially relieve the defendant from **all** their obligations under the contract as from 11 July 1998; **there was no valid contract as on that day**. That being so, it was thus his contention that the plaintiff's application should be dismissed as **there was nothing to declare.**

He further submitted that due to the plaintiff's aforesaid rescission, even if the contract was held not to be void *ab initio* by me, the defendant would still be in the same position as above as from 11 July 1998 since there was **no** valid contract as from that date. Thus the more legitimate claim against his client, if any, would and should be an appropriate claim **for** damages, **but** certainly **not** for an application of an order of declaration as prayed for in this application.

The plaintiff's application for an order of declaration was also strongly opposed by Dato' Siva on the grounds of estoppel and waiver. It was his contention that for the plaintiff to be justifiably reasonable to seek an equitable relief for an order of declaration, they should not have waited for almost **three** years **without** doing anything to enforce the defendant to observe their obligations under the contract **before** they filed in their encl. (3) application.

In the above context, it cannot be disputed that the contract was duly executed between the plaintiff and the defendant **on** 15 July 1995. During the subsistence of the contract, there were numerous Architect Certificates issued until it was rescinded and or terminated by the plaintiff on 11 July 1998. During that period, there were thirty (30) Certificate of Payments being issued; the **first** was **dated 24 November 1995,** and the **last** was **dated 11 June 1998**. It is also an **undisputed fact** that, **between** 24 November 1995 and 11 June 1998 **no** RS has ever been kept in a separate bank account for the benefit of the plaintiff. That fact was well within the plaintiff's knowledge and yet, they **did nothing** to cause the defendant to fulfil their obligations under cl. 30(4) of the contract. That passive act of the plaintiff, according to Dato' Siva, can be construed as "... the plaintiff's (by their) own conduct (,) ... have waived their rights under cl. 30(4)(a) (of the contract)."

Lastly, Dato' Siva also submitted that his client has the **right to deduct Liquidated and Ascertained Damages ("LAD"), and** also the **costs of rectification of defective works by virtue of cls. 22 and 15 of the contract respectively.** The said cl. 22 gives the defendant, as "employer" of the project, the right to "... deduct such sum from any monies due or to become due to the contractor, (the plaintiff), under (the) contract. "As damages for any non-completion of any work under the contract. **... (A)ny monies due or to become due to the contractor ..."** referred to by the said cl. 22, would therefore, in my considered opinion, include the RS which is the main subject matter of the plaintiff's encl. (3) application. In that respect, it was contended by the defendant that they were entitled to a RM50,000 per day LAD. **By** the plaintiff's own calculation up to 11 July 1998, the date of the rescission of the contract, the total sum of LAD amounted to RM15,050,000.

Based on the aforesaid figure of RM15,050,000, it was therefore emphasised by Dato' Siva that, it is trite law that once LAD exceeds the RS, the obligation of the defendant, as employer of the project, to set aside the retention sum into a separate bank account as contended by the plaintiff's counsel ceases automatically. For that he relied on the case of *Hsin Chong Construction Co. v. Yaton Realty Co*. 40 BLR 119, which cited and relied on the case of *Henry Boot Building v. Croydon Hotel & Leisure Co.* 36 BLR 41.

In the said *Henry Boot*'s case, the Court of Appeal in dismissing the appeal by the plaintiff against Mr. Justice Thomas' decision in refusing to grant a mandatory injunction applied for held as follows:

> (1) Although under Clause 30 (4)(a) the employer was under an obligation to appropriate and set aside amounts retained as a separate trust fund and that obligation could be enforced by the grant of a mandatory injunction, no such injunction could be granted at the time when the employer was entitled to deduct a greater amount of liquidated or ascertained damages because there was no subsisting obligation to appropriate and set aside ... .

The reason for it is contained in pp. 46 and 47 of the same case when Nourse LJ said as follows:

> ... At the most their relationship is, as (Mr. Justice Thomas) has held, that of debtor and creditor. It necessarily follows that no injunction can be granted ...

Thus if their relationship was purely "that of debtor and creditor" and **not** as "a trustee" the question of the defendant setting aside for purposes of appropriating the said sum as RS **in** a separate bank account **for** the benefit of the plaintiff will never arise by virtue of cl. 22 of the contract.

As in the aforesaid *Henry Boot*'s case, cl. 22 of the contract in the present case before me has similar and identical effect as that in cl. 22 of the said *Henry Boot*'s case. Both the said **cl. 22 undisputably gave the defendant the necessary right to have recourse to the RS from time to time for payment of any legitimate and contractually binding LAD**. Such payment(s) could be made by the defendant **by** deducting **from** any sum due or to become due **to** the plaintiff.

According to the *"Commentory"* at p. 42, of the said *Henry Boot*'s case, it was noted as follows:

> ... (*The right* in the present case referred to above) in effect *takes precedence over the obligation to create and set aside a separate trust fund* into which the retention money would otherwise be paid. *If* therefore *a certificate is issued under Clause 22 before a separate trust fund has been created, the employer would not be obliged to establish such a trust fund* when to do so would be pointless since *he would be entitled to have immediate recourse to it to recover the amounts to which he was entitled. Similarly, even where a trust fund has been created, the issue of a certificate under Clause 22 ... immediately confers on the employer a right to draw from that fund so that he is from that time pro tonto no longer a trustee but a creditor.* (emphasis added).

In so far as this application is concerned, there is **no** dispute that certificates under cl. 22 of the contract were issued. **It is also an undisputed fact that when those certificates were issued the RS referred**

to by the parties has not yet been set aside. Thus on the authority of the said *Henry Boot*'s case, I conclude that the defendant was therefore entitled to deduct such amount for LAD **without** having to set aside for RS. The fact that there were LAD payments to be made could **not,** in my considered opinion, be disputed by the plaintiff, especially in the light of "THB2" to encl. 5(A).

The aforesaid "THB2" of encl. 5(A) dated 5 March 1998 from Unibina Architect, the defendant's architect, stated as follows:

> **CERTIFICATE ON NON-COMPLETION**
>
> It is hereby certified that you have **failed to complete the works by** the date for Completion stated in the Appendix to the Conditions of Contract ... i.e. on **12 Sept 1997** and in my opinion the said works ought to have been completed.
>
> **In accordance with Clause 22 of ... (the) Contract**, you are hereby informed that you are **liable to pay or allow to the Employer a sum calculated at the rate stated in the Appendix to ... (the) Contract i.e. RM50,000.00 per day as (LAD)** for the period during which the said works shall so remain and have remained incomplete **and the Employer may deduct such damages from any monies due or to become due to you under this Contract**. (emphasis added).

It is to be noted that, the amount of "RM50,000 per day for LAD" is **not** the invention of the defendant or the Unibina Architect, **but** was spelt out **in** the Appendix to the said contract.

Secondly, such a claim for LAD was brought about as a result of the **plaintiff's letter dated 11 July 1998**, marked as exh. **"THB1"** to **encl. 5(A) to** the defendant **rescinding the contract with immediate effect**. At p. 3 of the said letter, the plaintiff wrote to the defendant, *inter alia*, as follows:

> ... it can be clearly established that you have unequivocally envinced your intention not to be bound by the terms and conditions of the Contract and have repudiated the Contract. We are to inform you that **we** hereby accept your said repudiation, and **hereby rescind the said Contract with immediate effect** ...
>
> Further and/or in the alternative, ... we refer you to Clause 26(1)(b) of the Contract ... and **we accordingly hereby give you notice that our employment under this Contract is determined forthwith.** (emphasis added).

Nowhere in the plaintiff's affidavits that they denied that there were **no** defective works which ended up in LAD payment(s) to be made. However, they did state that various figures given **by** the defendant **to** the plaintiff were unrealistic, excessive and inflated **without** producing or proposing figures which would and could have persuaded the court to accept such figures so produced **by** the plaintiff. In such absence, Dato' Siva urged the court to accept the figures produced **by** the defendant as being reasonable, and that figure is well above the RM4.8 million RS spoken of by cl. 30(4)(a) of the contract. In that context, I fully agree with Dato' Siva's contention. The fact that the certificates under cl. 22 of the contract have been issued **before** the RS was ever set aside, **and** premised on the authority of the aforesaid *Henry Boot*'s case will exonerate the defendant of the contractual obligation to appropriate and set aside the required RS as stipulated by cl. 30(4)(a) of the contract. On that ground itself, the injunction applied for should therefore be refused.

In the aforesaid *Henry Boot*'s case, the Court of Appeal approved the case of *Rayack Construction Ltd. v. Lampeter Meat Co. Ltd.* [1979] 12 BLR 30, which was heavily relied on by the plaintiff to urge the court to issue an order of declaration in favour of their application. I must point out at this very juncture that it was **not** disputed by Dato' Siva that principles laid down in the said *Rayack*'s case are correct but it was argued by him that the said case has **no** application to the plaintiff's case. For that reason, it requires me to look further whether or not the said *Rayack*'s case can assist the plaintiff's case.

In the said *Rayack*'s case, Vinelott J, granted the plaintiff the declaration sought for and ordered that the defendant were to pay the required RS into a separate account. This case was followed by Mr. Justice Rhind in the *Concorde Construction Co. Ltd. v. Colgan Co. Ltd.* [1984] 29 BLR 125.

However, closer perusal of the facts of both the said *Rayack*'s case and the *Concorde*'s case shows a very clear and apparent distinction with the present application before me. In both the aforesaid cases, there was **no** termination of the relevant contracts. I would have held the same if the contract in this application was, at the time of filing encl. (3) application **on** 29 October 1998, that contract was still subsisting. Unfortunately for the plaintiff, **it is an undisputed fact that by their letter dated 11 July 1998, the contract was rescinded with immediate effect.** It was so admitted **by** the plaintiff as being their contractual right to do so pursuant to and by virtue of cl. 26(1)(b) of the contract.

The aforesaid rescission must have led Dato' Siva to submit that such an act **by** the plaintiff has the effect of making the contract void *ab initio*. In support he quoted in full s. 40 of the Contracts Act 1950 and also the cases of (i) *Yong Mok Hin v. United Malay States Sugar Industries* [1967] 2 MLJ 9 and (ii) *Mussen v. Van Diemen's Land Co* [1938] 1 All ER 210. That conclusion was strongly opposed by Encik Vincent who contended that such an action of the plaintiff will **not** make the contract void *ab initio*. He further argued that the rights of the plaintiff under "such rescinded contract", including their right to insist due compliance **by** the defendant under cl. 30(4)(a) of the contract by way of a declaration and a mandatory injunction, remain to be valid and enforceable in the circumstances of the facts of their application.

On the facts of the present application, I completely disagree with Dato' Siva's above contention. Such an act **by** the plaintiff **will only render the contract voidable,** and **not** void *ab initio*. As such, in the context of the parties' rights and obligation under the contract **before** the said rescission, will remain to be enforceable **unless** made or become unjusticiable **by** law; for example such a claim is made: (i) outside the required statutory limitation period, or (ii) is **estopped** in equity from doing so or (iii) some special circumstances that made performance of any or all justifiable contractual obligation(s) impossible to perform, **but not** necessarily in the manner as canvassed by Encik Vincent, for a number of reasons.

Section 40 of the Contracts 1950, in my considered opinion, certainly **does not** have the effect as contended by Dato' Siva. It states as follows:

> 40. **Effect of refusal of party to perform promise wholly.**
>
> When a party to a Contract **has refused to perform, or disabled himself from performing, his promise in its entirely, the promisee may put an end to the Contract, unless he has signified,** by words or conduct, **his acquiesce in its continuance.** (emphasis added).

... (To) put an end to the contract ..." obviously **does not make** that contract itself void *ab initio*. It gives the innocent party "to put an end to the contract "**without** being liable to do his "remaining obligation(s)" under the contract. He is, as from that point of time, being discharged from carrying out to perform those "remaining obligation(s)"; as far as he is concerned the contract is voidable. His rights and liabilities under the said contract **before** it became "voidable "remain to be enforceable, "... unless he has signified, by words or conduct, his acquiescence in its continuance".

P. Ramanatha Aiyar in his *"The Law Lexicon"* Reprinted Edition 1987, at p. 1117, wrote as follows:

> Rescind. To rescind is to abrogate, annul, avoid or cancel a contract.

but does not say that the particular contract is void *ab initio* by an act of rescission. K.J. Aiyar's *"Judicial Dictionary"* 12th edn. 1998, at p. 1078 states that:

> Rescission of Contract – Annulment or revocation of contract."

which is **not** the same as making the contract "void *ab initio*". The only point relied by Dato' Siva which appears to be in his favour is found in "*Black's Law Dictionary*" 6th edn. 1990 at p. 1306 under *"Rescission of Contract"* which defines it as follows:

> To abrogate, annul, avoid, or cancel a contract; particularly, nullifying a contract the act of a party. The right of rescission is the right to cancel (rescind) a contract upon the occurrence of certain kinds of default by the other contracting party. *To declare a contract void in its inception and to put an end to it as though it never were. ... . A 'rescission' amounts to the unmaking of a contract, or an undoing of it from the beginning,* and *not merely a termination,* and *it may be effected by mutual agreement of the parties, or by one of the parties declaring rescission* of contract *without consent of other if a legally sufficient ground therefore exists, or by applying to courts for a decree of rescission* ... It necessarily involves a repudiation of the contract ... . Nonetheless, *not every default in a contract will give rise to a right of rescission.* (emphasis added).

Applying the facts of this application to the above definition, I could not find any evidence that the contract was rescinded "by mutual agreement of the parties "nor was there any **application for and issuance of**" a decree of rescission "from any court. **The "declaring (of) rescission" of the contract was unilaterally done by the plaintiff without** giving any notice of "repudiation of the contract" due to the existence of "a legally sufficient ground" to repudiate the contract due to the defendant's "default in a contract." H.C. Black certainly wrote that, "... **not** every default in a contract will give rise to a right of rescission." Thus, it appears to me that, whether or not there is that "legally sufficient ground" to declare rescission of the contract as intended by the said author, it has to be first tested **by** the court; and there is **no** evidence to that effect.

Having said the above, the case on point is *Morello Sdn. Bhd. v. Jaques (International) Sdn. Bhd*. [1995] 1 MLJ 577. It is clear at p. 595, para D, the Federal Court recognised and endorsed what was said by the House of Lords in *Johnson v. Agnew* [1980] AC 367 said as follows:

> It is clear now that on rescission only future obligations come to an end ...

At p. 596 para (B) of the said *Morello*'s case, it was stated by the court as follows:

> In such a situation, the rights and obligations of the parties so far as the future is concerned are discharged but those previously vested or incurred, as the case may be, remain untouched. (emphasis added).

The "previous vested (rights)" of the plaintiff in the context above, is clearly, *inter alia*, "the right to have recourse to the RS" **if** the RS was set aside. If that was not done, then it would be the plaintiff's "obligation" to insist that the required RS be set aside, if necessary, by way of specific performance of cl. 30(4)(a) of the contract. That "obligation" **must** be done during the subsistence of the contract **but not after** it was rescinded. **If and only if** the required RS was so set aside, will the plaintiff's "right to have recourse to the (said) RS" remain untouched as in the aforesaid *Rayack*'s case.

From the facts of this application, there can never be any dispute that there was **no** evidence at all the required RS has ever been set aside or the demand **by** the plaintiff to request or compel the defendant to set aside such RS **before** the contract was undisputably rescinded **by** the plaintiff as discussed above. That being the fact, I therefore held that, the situation falls squarely within the ambit of s. 40 of the Contracts Act 1950 as being, to borrow the words of the said section, "... **(the plaintiff) has signified, by ... conduct, (their) acquiesce in its continuance (ie, not to insist the setting up of the required RS during the subsistance of the contract**." As such, the setting of the required RS **after** rescission takes place will therefore tantamount to "future (obligation) of the defendant" which the Federal Court held in *Morello*'s case, *supra*, as:

> ... (one of) the ... obligation of the (defendant) ... as (to) the future (obligation which) is discharged ... (without affecting) those previously rested or incurred, as the case may be, remained untouched.

In other words, in the circumstances of the facts of this application, the said *Morello*'s case is of **no** assistance to the plaintiff nor is it applicable to the present application before me.

In the said *Morello*'s case, the main issue before the Federal Court with a split decision involves damages in relation to an **unpaid deposit** of a **sale and purchase** of a Jaques crushing plant at the premises of the buyer at Pedas, Negeri Sembilan, at the price of RM1,167,000 by way of written

agreement, the buyer had **agreed to pay** to the seller an initial sum of RM116,700, being 10% of the purchase price, expressly stipulated as a deposit, to be paid **upon** signing the said agreement. **The said agreement was actually signed.**

In the statement of claim, there was prayer for **damages for repudiation**, and **not**, I must stress here "**not**", for **a declaration nor** for an order of mandatory injunction as in the present case before me. In the material position of paras. (2) and (3) of the statement of defence specifically stated that:

> 2. ... it was specifically agreed by both parties that **no** payments would be made on signing the agreement ... (subject to conditions (a) - (d))
>
> ...
>
> 3. It was further agreed by both parties that the (four subsequent payments of the balance agreed purchase price of the aforesaid plant) would only be made after ... (conditions 2(a) to 2(d) referred above) have been obtained and the plaintiffs were fully aware of and agreed to these.

The Federal Court was asked to determine on the effect of the said cl. 3 of the said agreement.

The majority decision of Jemuri Serjan, CJ, Sabah and Sarawak and Edgar Joseph FCJ held at p. 578 as:

> (5) ... The effect in law of the contractual obligation to pay a deposit is to vest an indubitable right in the vendor to receive the contract coming into existence notwithstanding the subsequent termination. This is because the deposit is given as security for the performance of the contract. ...
>
> (6) ...
>
> (7) ... The right to recover an unpaid deposit or to forfeit a deposit which has been paid, allows the vendor to obtain compensation without proving his damage and there is no duty to mitigate ...

From the above, it can be clearly seen that the above majority decision was premised on the fact that the said **10% payment was a deposit**. It was "... given as security for the performance of the contract." The plaintiff's right is in the nature of "compensation" **after** the contract was recognisably **repudiated**. That conclusion was **not** agreed upon by Mohamed Azmi FCJ.

In dissenting with the above majority decision, His Lordship held that:

> (10). ... A claim for paid or unpaid deposit is based on whether the amount claimed was unconditionally due and payable *prior* to the Defendant's repudiation, and whether the consideration for the promise had been executed. *The deposit must be in the nature of a true deposit and, must be an unconditional promise to pay the deposit immediately ... Thus, where the promise to pay immediately on signing the contract is conditional, as in this case ...*
>
> (11) ... To qualify as *true deposit*, the contract *should contain words or expressions capable of being construed to mean that the parties intended the deposit to be for a dual purpose not only as a guarantee of performance* (as held by the aforesaid majority decision) *but also as part payment towards the purchase price ... (which)* cannot depend on the mere labelling of the word but *must depend on the contruction of the words and expression used in a particular contract*. (emphasis added).

In support, His Lordship quoted and relied on two Federal Court cases of (i) *Jagatheesan*'s case [1969] 2 MLJ 253 at p. 256 and (ii) *Kuruppiah v. Petaling Garden Co. Sdn.* [1972] 1 MLJ 173. Since the dissenting judgment was well grounded on two Federal Court cases and on the facts of *Morello*'s case, I am inclined to accept Mohamed Azmi FCJ's view.

Be that as it may, *Morello*'s case has nothing to do with "trust money" in the nature of RS. There was no claim of LAD involving third parties in *Morello*'s case. Furthermore, **no** monies has ever been set aside for the RS. As pointed out earlier, the plaintiff did **not** request or compel the defendant to set aside for RS during the subsistence of the contract. Thus the plaintiff's application for a mandatory injunction consequential to an issuance of a declaration in their favour, would, applying a paralled reasoning of the dissenting judgment of Mohamed Azmi FCJ above, can be equated to a **"conditional obligation"** on the part of the defendant to set up "a trust fund" in the nature of RS. That, I would hold would **not** be within the ambit of the "(plaintiff's) right ... previously vested ... (which) remain untouched" even **after** the plaintiff rescinded the contract. What is truly the "plaintiffs right ... previously vested" and "... remain untouched", is to claim for appropriate and justifiable damages in the form of compensation, if it can be proved that it was the defendant that constructively caused the plaintiff to rescind the contract. This is also in line and provided for by s. 76 Contracts Act 1950.

Section 76 of the Contracts Act 1950 provides:

> 76. **Party rightfully rescinding contract entitled to compensation.**
>
> A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

but not the right to a declaration. Thus, it would be obvious from the facts of this application, an order for a declaration and consequentially a mandatory injunction would **not** be proper remedies to be levelled against the defendant. The reason for it is statutorily provided in s. 65 of the same Act which speaks of the **"Consequences of recission of voidable contract"** to which contractual dispute between the parties aptly can be classified. The said section clearly provides as follows:

> 65. **Consequences of rescission of voidable contract.**
>
> **When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein** contained in which he is promisor. **The party rescinding** a voidable contract **shall**, **if he has received any benefit thereunder from another party** to such contract, **restore the benefit**, so far as may be, **to the person from whom it was received.** (emphasis added).

Since both the learned counsels agreed with the court at the beginning of the submission the issue of "whether or not the defendant is required, in law, to set aside RS **after** the plaintiff admitted rescinding the contract" should be addressed first, it is thus incumberance upon me to examine further the statutory effect of the said s. 65 of the Contracts Act 1950. They also agreed that it would only be necessary for me to consider other issues raised if, and only if, the answer to the said question is in the affirmative but not otherwise; and for that, I will next endeavour to do.

The aforesaid s. 65 can be broken down into **three** parts. They are:

(1) As to the nature of contract itself;

(2) Rights and obligations of the party rescinding the contract; and

(3) Rights and obligations of the other party to the contract affected **by** such rescission.

As to **(1)**, there is no doubt that, on the facts, the contract was a **valid** contract **until** it was **rescinded by the plaintiff** as discussed above. The result of that rescission made the contract **voidable** and **not** void *ab initio* for the reasons discussed earlier.

As to **(2)**, the plaintiff's "rights and obligations" can be classified into those accured and incurred:

(i) **before;** and

(ii) **after,**

the contract was rescinded by the plaintiff. In so far as this application is concerned, I have **no** doubt whatsoever that the plaintiff had their contractual right to insist the defendant to set aside for RS **before** the contract was rescinded notwithstanding the fact that the defendant may have a justifiable right to set off for LAD as earlier discussed. They can do that by requesting the defendant to do so on their own by reminding them of their contractual duty to do so under cl. 30(4)(a) of the contract. Should the defendant fail to do so or ignore such a request, then it would be open to the plaintiff to invoke s. 41 of the Specific Relief Act 1950.

The aforesaid s. 41 provides, *inter alia*:

> **41. Discretion of Court as to declaration of status or right.**
>
> Any person entitled to any legal ... right as to any property, may institute a suit against any person denying, or interested to deny, his ... right, and **the court may in its discretion make therein a declaration that he is so entitled**, and the Plaintiff need not in that suit ask for any other relief:
>
> Provided that no court shall make any such declaration where the Plaintiff, being able to seek further relief than a mere declaration ..., omits to do so. (emphasis added).

Thus, it would be clear to me that, if the plaintiff had religously adhered to his part of contractual obligation(s) and requested the defendant to set aside for the required contractual RS **during** the life of the contract **but** was refused or ignored **by** the defendant, it would be obvious, in the circumstances, **the former** will be entitled to seek for the aforesaid s. 41 relief in spite of a wide discretion given **to** the court whether or not to grant such a declaration. That was **not** done **by** the plaintiff. What they did was **after** and **not before** the contract was rescinded **by** them. As such, the said s. 41 could not be of any assistance to them. As discussed earlier, such "a right" is **not** "a right" accured **and** "remains untouched" **after** the plaintiff rescinded the contract. In conclusion, the **failure** on the part of the plaintiff **to discharge their contractual "obligation" in not** "requesting and or compelling" the defendant to set aside for the required RS during the life of the contract, statutorily deprived them to seek relief under the aforesaid s. 41.

In *Caxton (Kelang) Sdn. Bhd. v. Susan Joan Labrooy & Anor.* [1987] 2 CLJ 36, Siti Norma Yaakob J (as she then was), in quoting *"Declaratory Orders"* 2nd edn. by Yoning, pointed out at p. 38 that, in order for a declaratory order to issue, **six** factors **must** be present and they are:

(1) There must exist a controversy between the parties.

(2) The proceedings must involve a **'right'**.

(3) The proceedings must be brought **by** a person has a proper or tangible interest in obtaining the order, ... (otherwise) referred to as 'standing' or *'locus standi'*.

(4) The controversy must be subject to the court's jurisdiction.

(5) The defendant **must** be a person having a proper or tangible interest in opposing the plaintiff's claims.

(6) The issue must be ripe, ie, it must not be of academic interest, hypothetical or one whose resolution would be of no practical utility. (emphasis added).

From the facts of this application, **factor (2) above** is **not** present once the plaintiff rescinded the contract in the manner discussed above. Be that as it may, in the *Caxton*'s case, **the relevant tenancy agreement was still valid**, as opposed to the rescinded contract as in the present application.

Another case quoted and heavily relied upon **by** Encik Vincent was the case of *Mac-Jordan Construction Ltd. v. Brookmount Erostin Ltd. (in administrative receivership)* 56 BLR 1, to persuade me to allow his client's application. The basis of his main contention was that, the Court of Appeal in the said *Mac-Jordan*'s case did endorse with approval the principles laid down by Vinelott J in the case of the aforesaid *Rayack*'s case whereby a declaration and consequential orders were granted by Mr. Justice Vinolett. In that context, I have already elaborately pointed out earlier that those principles in the aforesaid *Rayack*'s case, **on the facts** of this application, **cannot** be parallelly equated and applicable to **either** the said *Mac Jordan*'s case **or** the plaintiff's application.

The said *Mac Jordan*'s case, upon close perusal, clearly shows that, **both** in the court below and in the Court of Appeal, the main issue discussed and considered at length was the issue of "preferential rights" of the plaintiff over the agreed RS as "trust fund" over the defendant, **but** that was **not** the issue for determination **in** the said *Rayack*'s case. In the former case; in dismissing the appeal it was held at p. 2 as follows:

a when the bank took its floating charge it was not then interfering with the contractual right of the Plaintiff and was therefore entitled, when the charge crystallised, to the benefit of its security even though it may have had notice of the Plaintiff's contractual right to have the retention fund set aside.

...

b Per Scott LJ: the court should not, in any event, make the mandatory order sought in circumstances where the effect would be to give an unsecured creditor preference over other unsecured creditor of an insolvent debtor.

Clearly, the above involves an "insolvent debtor" which is **not** the case in c the present application before me. Thus again the said *Mac Jordan*'s case is therefore of **no** assistance to the plaintiff's application.

From the above analysis, since rescission and or termination clause is entrenched in the contract, the plaintiff **may** have a justifiable claim **for** compensation under s. 76 of the Contracts Act 1950, which is **not** an issue d for me to consider presently. Since it is also not disputed **by** the parties that the RS has never been set aside, thus in this application, the question of **"trust"** and the possible "breach of trust" is also **not** an issue before me; hence the case of *Re Marshall's Will Trusts* [1945] 1 All ER 550 could not provide any positive input for and in favour of the plaintiff as there e was **no** "trust" ever created **by** the defendant in the nature of the required RS.

Since it is **not** the defendant who brought this Application, it will be purely academic for me to discuss in more detail than what I have already done so earlier above as to the **"rights and obligations"** of the defendant under f s. 65 of the Contracts Act 1950; the **third** part of the said section. Suffice for me for the purpose of this application to say that they were well justified to oppose the plaintiff's application.

In conclusion, from all the above discussions, upon rescission of the g contract **by** the plaintiff, the **contractual right** of the plaintiff **to insist** the defendant to set aside the required RS is **not** the plaintiff's "right ... previously vested (that) remained untouched" ("plaintiff's right") contemplated by the aforesaid *Morello*'s case *supra.* That **plaintiff's right** can only be insisted upon **during** the life span of the contract and **not after** h it was rescinded **by** the plaintiff as in this application. As such, by virtue of s. 56 of the Contracts Act 1950, the defendant **cannot** be mandatorily ordered to fulfil his "obligation" of setting aside the required RS **after** 11 July 1998; the material date in which the contract was rescinded **by** the plaintiff. What would be most probably justifiable for the plaintiff, if i it can be so proved, is to claim **compensation** for damages for the

defendant's **non-fulfilment** of his "obligation" under the contract by virtue of s. 76 of the Contracts Act 1950. For the reasons elaboratedly discussed above, an order of declaration and its consequential remedies would, in the circumstances of the facts of this application, also be unsustainable. Thus, I have no alternative but to dismiss the plaintiff's application with costs; and so ordered.